IN THE

Supreme Court of the United States

October Term of 1967

No.

486

J. DAVID STERN,

Petitioner

vs.

SOUTH CHESTER TUBE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. David Stern, petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 25, 1967.

CITATIONS TO OPINIONS BELOW

The Opinion of the District Court printed in the Joint Appendix filed in the Circuit Court on Page 13(a), is reported in 252 F. Sup. 329 (1966). The opinion of the Circuit Court of Appeals printed in Appendix "A" hereto, page 15, is not yet reported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on May 25, 1967, Appendix page 23. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Does the United States District Court have jurisdiction to enforce the substantive right of a stockholder, established by state legislative enactment, to inspect corporate records?

STATUTES INVOLVED

The Statutory provisions involved are 28 U.S.C. 1332, Section 1.

"The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states."

and

The All Writs Act, 28 U.S.C. 1651, which provides that the lower Federal Courts

". . . . may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law".

and

The Civil Procedural Rule 81(b) which provides:

"The Writ of Scire Facias and Mandamus are abolished. Relief heretofore available by Mandamus or Scire Facias may be obtained by appropriate action or by appropriate Motion under the practice prescribed by these rules."

and

The Pennsylvania Act, which is as follows:

"Every shareholder shall have a right to examine, in person or by agent or attorney, at any reasonable time or times, for any reasonable purpose, the share register, books, or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom." 1933 May 5, P. L. 364, art. III, Sec. 308, 15 P.S. Sec. 2852-308.

STATEMENT

Petitioner, a resident of the State of New York, who owned stock of the respondent corporation valued in excess of Ten Thousand ($10,000) Dollars, filed a Complaint in the Eastern District of Pennsylvania, where the respondent was incorporated and maintained its business and offices, requesting the Court to issue an order permitting him to inspect the corporate records of the respondent. Jurisdiction of the Court was invoked under the provisions of 28 U.S.C. 1332(a). The District Court dismissed the Complaint on the ground that the relief sought was in the nature of a Writ of Mandamus which was beyond the jurisdiction of the District Court.

The Circuit Court of Appeals for the Third Circuit affirmed the opinion of the District Court with one of the three Judges who heard the case dissenting.

REASONS FOR GRANTING THE WRIT

1. The complexities of modern business require a clear statement from this Court on the rights of a stockholder as against his corporation.

2. The Circuit Court has misconstrued the decisions of this Court and has decided a question of Federal Jurisdiction, in confliet with their intent, and the intent of Congress in conferring jurisdictions in diversity cases.

3. The reasoning employed by the Circuit Court leads to results so absurd as to bring the law into disrepute.

The Commonwealth of Pennsylvania has created a substantive right and corresponding duty between private parties, viz. the right of a stockholder to inspect the corporate books. The right is enforceable at law in Pennsylvania by a writ which the State terms, a "Writ of Mandamus", and is enforceable in equity in conjunction with other relief.

15 Purdon's Statutes, Sec. 2852-308;

Strassburger vs. Philadelphia Record Company, 335 Pa. 485, 6 A. 2d 922;

Goldman vs. Trans-United Industries, 404 Pa. 288, 171 A. 2d 788;

Taylor vs. Eden Cemetery Company, 337 Pa. 203, 10 A. 2d 573;

Hagy vs. Premier Manufacturing Corp., 404 Pa. 330, 172 A. 2d 283;

Spang vs. Wertz Eng. Co., 382 Pa. 48, 114 A. 2d 143.

The Third Circuit now decides that a citizen of a foreign state may enforce this right only in the courts of Pennsylvania, and that the Federal Courts are barred although all usual requirements for Federal jurisdiction are present.

It holds that the jurisdiction of the District Courts is limited to "Civil Jurisdiction", and that an original proceeding in Mandamus is not "Civil Jurisdiction" within the meaning of 28 U.S.C. 1332(a). This doctrine is based upon a misunderstanding of the first cases decided by this Court.

The cases of *McIntyre vs. Wood*, 7 Cranch 504, *McClung vs. Silliman*, 6 Wheaton 598, and succeeding cases, decided that the Circuit Court (Now the District Court) had no power to issue a writ of mandamus commanding a state or federal official to do a ministerial act except to further the exercise of jurisdiction otherwise conferred. The Court held that the issuance of such a writ to an official was not an exercise of "Civil Jurisdiction".

In the context of the facts of these cases, the relief sought, and the reasoning of the Court, it should be obvious that the Court was thinking in terms of the descendant of the high prerogative writ, by which the King first, and later the Courts, controlled the conduct of the inferior courts and public officials.

In the case of *Kendall vs. Stokes*, 3 How. 100, the Court said:

> "The remedy in that form (mandamus), originally was not regarded as an action by the party, but as a prerogative writ, commanding the execution of an act, where otherwise justice would be obstructed; *and issuing only in cases relating to the public and government.*" (Emphasis added.)

As society and economy become more complex, an enforcement process for mandatory acts in ordinary civil cases become necessary. Thus, the Courts fashioned the old prerogative writ to this purpose. It lost its former character and became ordinary civil process.*

> "The writ of mandamus does not issue from or by any prerogative power and is nothing more than the ordinary process of a Court of Justice *to which everyone is entitled, where it is the appropriate process for asserting a claim.*" (Emphasis added.)
>
> *Kentucky vs. Dennisson,* 24 How. 66, page 98.

It was in this fashion that the Commonwealth of Pennsylvania made use of the writ to enforce the statutory right of a stockholder to inspect books. It could have referred such actions to equity which has a technique for such enforcements, or it could have fashioned another remedy. This was unnecessary. The writ of mandamus was at hand as the traditional weapon in corporate affairs, stemming from the days when corporations were created by the King's franchise, and in a

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* The Writ of Quo Warranto has undergone a similar transformation. And because it has, the District Courts have jurisdiction to issue such writ when it is civil in nature.

See *Wilder vs. Brace,* 218 F. Supp. 860, citing the *Ames* case.

special sense (by way of monopoly, etc.), extensions in the exercise of the King's power. It followed that a prerogative writ directed against public officials could be directed against corporations and their officers. It was an easy transition to continue its use, although private business corporations had long lost all governmental attributes.

What then is this "Writ of Mandamus"? It is not the old prerogative writ. It is civil process, used in ordinary civil proceedings between private parties where performance is required.

Words have a mystique. We endow them with magical attributes vesting them with the essence of the objects they denote.

This is the basic error of the Circuit Court. The word "Mandamus" was first used to describe the extraordinary prerogative writ directed against public officials. Because of this, the civil process it now describes (and since Rule 81b* the remedy of commanded performance) becomes an extraordinary remedy, outside the purview of the ordinary civil jurisdiction of the Federal Courts.

The following from the opinion of the Circuit Court of Appeals makes this obvious:

> "The plaintiff argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district

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* The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed by these rules.

court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under Sec. 1332(a) of 28 U.S.C.A. is limited to "civil actions."[1] Albanese vs. Richter, 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a "civil action" within the meaning of the said statute. Insular Police Commission vs. Lopez, 160 F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; Marshall vs. Crotty, supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. The only such power held by the federal courts is that conferred upon it by the 'All Writs Act', supra, and this is subject to the restrictions of the statute. It was held in Knapp vs. Lake Shore Railway Co., supra, that an earlier counterpart of the present statute did not 'confer power on the (lower) courts to issue mandamus in an original proceeding.' "

It is the position of the petitioner that, although the Pennsylvania courts enforce the right of inspection by a writ termed "mandamus", which partakes of the nature of the prerogative writ only in that it requires the performance of an act, this action is one between private parties, for the enforcement of private rights, is essentially civil in nature, and not within the doctrine of the cases decided by the Supreme Court of the United States, which deal with forms of mandamus closely akin to the

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[1] The phrase "civil actions" has been substituted for the earlier language "suits of a civil nature, at common law or at equity." The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus. *Marshall vs. Crotty*, supra, 627.

old prerogative writ, public officials, or the procedures for enforcement provided by federal regulatory statutes. (e.g. *Knapp vs. Lake Shore Railway Co.,* supra.)

Under the doctrine of *Erie vs. Tompkins,* 304 U.S. 64, the Federal Courts must enforce state created substantive rights. Judge Ganey dissenting in the Court below said:

> "In my judgment, in construing these diversity cases, the courts have never accorded Erie R.R. vs. Tompkins, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of Erie R.R. vs. Tompkins, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.
>
> The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by Sec. 308(b) of the Business Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of mandamus. Hagy

vs. Premier Manufacturing Corp. 404 Pa. 330. In a federal court, under Erie R.R. vs. Tompkins, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state, and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure."

The Third Circuit has disregarded the spirit and dicta of its own cases, and its opinion forces peculiar distinctions upon the courts leading to results without basis in justice or practicality.

For example: If "A" owns stock and is entitled to the certificate and everyone admits it, a District Court cannot order the delivery. It is mandamus. But if the title is in issue, the Court can determine the title and then order the delivery. It is a suit to try title. In the first instance, a citizen of a foreign state must subject himself to a local court—in the second, he may apply to the federal courts. The end result, the delivery, is the relief sought in both cases. See *Hertz vs. Record Publishing Company,* supra.

In *Susquehanna Corporation vs. General Refractories,* 250 F. Supp. 797 (cited by Judge Ganey), and in *Steinberg vs. American Bantam Car Co.,* 76 F. Supp. 426, 173 F. 2d 179, injunctions were sought and granted

enjoining meetings until corporate records were made available.

It is implicit in petitioner's request for inspection, that he seeks to determine what he must do to protect his holdings. This includes a determination of the position he should take at corporate meetings and communications of that position to other stockholders.

Must he then first seek to enjoin a meeting before he can examine records?

A result, so archaic, has no place in modern law.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
David Freeman,
Richard H. Wels,
Attorneys for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15901

J. DAVID STERN and SOPHIE L. SIEGEL,*
Appellants

v.

SOUTH CHESTER TUBE COMPANY,
Appellee

Appeal From the United States District Court for the Eastern District of Pennsylvania.

Argued November 3, 1966
Before Ganey, Smith and Freedman, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 25, 1967)

By Smith, *Circuit Judge.*

This appeal is from the dismissal of a complaint in which the only relief sought by the appellant was the en-

* This appellant has withdrawn from the litigation.

forcement of his statutory right as a stockholder to examine the books and records of account of the corporate appellee and its subsidiaries. *Business Corporation Act*, 15 P.S. §2852-308B. The right is enforceable in an original action of mandamus in the court of common pleas of the county in which the corporation has its principal place of business. 12 P.S. §1911; *Goldman v. Trans-United Industries, Inc.*, 171 A. 2d 788 (Sup. Ct. Pa. 1961). Similar actions are not maintainable in the federal courts because of the limit on their jurisdiction.

Although the writ of mandamus has been abolished by the Federal Rules of Civil Procedure, rule 81(b), 28 U.S.C.A., the procedural relief available in lieu thereof is still governed by the "All Writs Act", 28 U.S.C.A. §1651. The statute provides that the federal courts "may issue all writs necessary or appropriate In Aid of Their Respective Jurisdictions and agreeable to the usages and principles of law." (Emphasis added.)

It has been uniformly held in a long line of decisions that a federal court is without authority to issue a writ of mandamus except in aid of its jurisdiction already acquired under an applicable federal statute. *Knapp v. Lake Shore Railway Co.*, 197 U.S. 536, 541-543 (1905); *Covington Bridge Co. v. Hager*, 203 U.S. 109, 111 (1906); *Marshall v. Crotty*, 185 F. 2d 622, 626 (1st Cir. 1950). There are other cases in point but we see no reason to cite them in this opinion. The relief here sought by the plaintiff is plainly not ancillary to a suit now pending in the district court. The issuance of the writ would not be in aid of the lower court's jurisdiction; it would simply terminate the litigation.

The defendant argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under §1332(a) of 28 U.S.C.A. is limited to "civil action"[1] *Albanese v. Richter,* 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a "civil action" within the meaning of the said statute. *Insular Police Commission v. Lopez,* 160 F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; *Marshall v. Crotty,* supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. The only such power held by the federal courts is that conferred upon it by the "All Writs Act," supra, and this is subject to the restrictions of the statute. It was held in *Knapp v. Lake Shore Railway Co.,* supra, that an earlier counterpart of the present statute did not "confer power on the [lower] courts to issue mandamus in an original proceeding."

We recognize that a federal court may enforce a state-created substantive right, and to do so fashion an appropriate remedy. *Cf. Guaranty Trust Co. v. York,* 326 U.S. 99, 105-107 (1945). However, we are not here concerned with the question of remedy but one of jurisdiction. The general jurisdiction of the district courts is limited and defined strictly by statute, in this case by §1651(a) of Title 28 U.S.C.A., supra. *United States v.*

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[1] The phrase "civil actions" has been substituted for the earlier language "suits of a civil nature, at common law or at equity." The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus. *Marshall v. Crotty,* supra, 627.

First Federal Savings & Loan Ass'n., 248 F. 2d 804 (7th Cir. 1957), cert. den. 355 U.S. 957. When thus limited and defined it cannot be extended by local statute. "The basic purpose of §1651, and of its statutory predecessors, was to assure to the various federal courts the power to issue appropriate writs . . . of an auxillary nature in Aid of Their Respective Jurisdictions as Conferred by other provisions of the law." (Emphasis added). *In Re Previn*, 204 F. 2d 417, 418 (1st Cir. 1953). It seems to me that the issuance of a writ of mandamus in this case would violate the plain statutory limitation on the lower court's jurisdiction.

The judgment of the district court will be affirmed.

Judge Freedman concurs in this opinion.

Ganey, *Circuit Judge*, dissenting.

In this country federal jurisdiction was originally vested in the courts of the United States under the Judiciary Act of 1789. By the Eleventh Section thereof the courts of the United States were vested with original jurisdiction of "all suits of a civil nature at common law or in equity" where the amount in dispute exceeded the sum of $500 and the parties were citizens of different states. Present jurisdiction is vested under 28 U.S.C.A. §1332(a)(1) in which, under the 1948 revision of this section, the words "civil action" were substituted for the words "suits of a civil nature", but this was done only to conform to Rule 2 of the Federal Rules of Civil Procedure and the change had no substantial effect on the jurisdiction of the courts. *Rosen v. Allegheny Corp.*, 133 F. Supp. 858, 865. Here, there is a requisite citizen-

ship between different states among the parties and it is submitted that the aggregate value of the plaintiff's sixty-two shares of stock in the company is in excess of $10,000 and, accordingly, the amount in controversy is measured by the value of the shareholder's investment and, therefore, the jurisdictional amount is well pleaded. *Lapides v. Doner,* 248 F. Supp. 883, 895.

The focal point of our inquiry here is since the action laid in the complaint is one for mandamus whether, in the exercise of the court's jurisdiction, it has the power to dispose of it.

There can be no denying the assertion by the majority, as it is abundantly evident that under the All Writs Act, 28 U.S.C.A. §1651, where mandamus is sought by way of relief under a federal statute, it will not lie and that it can only be invoked in furtherance of a jurisdiction already acquired. This is established by an almost unanimous authority beginning with *McIntire v. Wood,* 7 Cranch 504, through *Smith v. Allen,* 1 Pet. 453; *Graham v. Norton,* 15 Wall. 427; *Bath County v. Amy,* 80 U.S. 244; *Knapp v. Lake S. & M. S. Ry.,* 197 U.S. 537, to *Covington and Cincinnati Bridge Co. v. Hager,* 203 U.S. 108, 111, the reason stated being that the courts of the United States, in construing the All Writs Act, have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ.

Likewise, the courts have followed like reasoning in diversity cases relying on the same reasoning given in *McIntire v. Wood,* supra, and the other cases following it, citing *County of Greene v. Daniel,* 102 U.S. 187; *Davenport v. County of Dodge,* 105 U.S. 237; *Rosenbaum v. Bauer,* 120 U.S. 450, though, here, there was a dissent which ap-

plied the conformity statute then in effect, §914, Rev. Stat., and it is suggested that the majority may have felt that since the conformative statute was a federal statute, the same restriction on the jurisdiction of the court applied as in all the other cases theretofore.

However, in spite of this great weight of authority, it is my opinion that the writ should issue. In so holding, it is unnecessary to breast the great tide of authority hereinbefore mentioned, for, in my judgment, in construing these diversity cases, the courts have never accorded *Erie R. R. v. Tompkins*, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of *Erie R. R. v. Tompkins*, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state statutes and grant a remedy, if one is provided by state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.

The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by §308(b) of the Business Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of

mandamus. *Hagy v. Premier Manufacturing Corp.*, 404 Pa. 330. In a federal court, under *Erie R. R. v. Tompkins*, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure.

An indication of this approach finds basis in this court. In *Susquehanna Corp. v. General Refractories Co.*, 250 F. Supp. 797, 802, the lower court spoke as follows: "But even if that were not so [discussing the insufficient length of time between the granting of the writ and the stockholders' meeting], it is by no means certain that the federal diversity court could not grant mandamus when that remedy would be granted by a state court as a matter of state law. The cases defendants cite, holding mandamus to be beyond the powers of the federal courts, do not specifically consider the question in the context of a state mandamus statute sought to be applied in the federal court under *Erie* [Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188]. As Loss remarks, 'on the assumption that the equitable remedial rights doctrine is dead . . . the statutory case is easy: the federal courts will use the state statute . . . .' 2 Loss 1005. But see *Newark Morning Ledger Co. v. Republican Company*, 188 F. Supp. 813 (D. Mass. 1960). For *Erie* purposes, the 'remedy' of mandamus may be a matter of substantive state law which the diversity court would be bound to

apply." The lower court was affirmed by this court in a per curiam opinion at 356 F. 2d 985. It is to be noted here that in *Newark Morning Ledger Co. v. Republican Co.*, 188 F. Supp. 813, this approach under *Erie R. R. v. Tompkins*, supra, was not taken into consideration by the court.

Likewise, in *Hertz v. Record Publishing Co.*, 219 F. 2d 397, where mandamus was permitted because it was in aid of a jurisdiction previously acquired, nevertheless stated in footnote 2, page 398, by way of dictum, "However, even if title to stock were in issue, the district court had jurisdiction to issue the order. Under Pennsylvania law a shareholder has the substantive right to have his stock transferred on the corporation's books and to have a new certificate issued. Mandamus is available to him by statute." Accordingly, it would seem proper that this court should now come full cycle and hold that a substantive civil right granted by a state statute which the highest court of that state, in its decisional rulings, holds might be enforced by a mandamus statute of that state, should not only recognize the substantive right granted under the statute, but, as well, the remedy provided by the state statutes, in a diversity case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed March 21, 1966, be, and the same is hereby affirmed, with costs.

Attest:

Thomas F. Quinn,
Clerk.

May 25, 1967